Supreme Court, U. S.
FILED
FEB 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1283

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, JOHN W. BANKS, WILLIAM T. BANDY, JR., HARVEY B. EDWARDS, ANTHONY J. GALATE, DENVER O. NELL, R. DUANE ROGERS,
Petitioners,

v.

KANSAS CITY TERMINAL RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES L. HIGHSAW, JR.
JOHN O'BRIEN CLARKE, JR.
HIGHSAW, MAHONEY & FRIEDMAN, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Petitioners Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, et al.

Of Counsel:

WILLIAM J. DONLON
General Counsel
Brotherhood of Railway, Airline and Steamship Clerks
3 Research Place
Rockville, Md. 20850

Date: February, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

OPINION BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 10

1. There is a split among Courts of Appeal as to the basis for judicial review of awards of Special Boards of Adjustment created pursuant to Section 3, Second of the Railway Labor Act and the standards applicable thereto 10

2. This continuing controversy has produced in the present case an unfair result substantially impairing the protection of the Stabilization Agreement 13

CITATIONS

CASES:

Andrews v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972) 11

Brotherhood of Railroad Trainmen v. *Central of Georgia Railway Co.*, 415 F.2d 403 (5th Cir. 1969) *cert. den.* 396 U.S. 1008 ..... 13, 15

Brotherhood of Railway and Airline Clerks v. *Special Board of Adjustment No. 605*, 410 F.2d 520 (7th Cir. 1969) 12

Diamond v. *Terminal Railway Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970) 13

Employees Protective Association v. *Norfolk and Western Railway Co.*, 511 F.2d 1040 (4th Cir., 1975) .. 12

Kansas City Southern Railway Co. v. *Brotherhood of Railroad Trainmen*, 305 F.Supp. 1142, 1147-49 ... 13

Page

Merchants Despatch v. *Carmen*, 511 F.2d 1045 (7th Cir. 1977) 12
Union Pacific Railroad Co. v. *Sheehan*, 99 S. Ct. 399 (1978) 11
United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) 16

STATUTES AND RULES:

Railway Labor Act, 45 U.S.C. Sections 151 *et seq.* 3

Section 3, First 10, 11
Section 3, First (i) 7
Section 3, First (p) 9, 10, 12, 14, 15, 16, 19
Section 3, First (q) 2, 9, 10, 12, 13, 14, 15, 16, 19
Section 3, Second 2, 3, 11, 12, 19

United States Code, Title 28 ..... 2, 12, 15

Section 1254 (1) 2
Section 1331 ..... 12, 15
Section 1337 ..... 12, 15

Rule 56 of Federal Rules of Civil Procedure 9

Appendix A—Award No. 408 of Special Board of Adjustment No. 605 ..... 1a

Appendix B—District Court Decision 6a

Appendix C—Court of Appeals Decision 10a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, JOHN W. BANKS, WILLIAM T. BANDY, JR., HARVEY B. EDWARDS, ANTHONY J. GALATE, DENVER O. NELL, R. DUANE ROGERS,
Petitioners,

v.

KANSAS CITY TERMINAL RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, John W. Banks, William T. Bandy, Jr., Harvey B. Edwards, Anthony J. Galate, Denver O. Nell, R. Duane Rogers respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on November 20, 1978.

OPINION BELOW

The opinion of the Court of Appeals, is reported, at 587 F.2d 903 and appears in the Appendix C hereto. The opinion and order of the United States District Court, reported at 442 F. Supp. 1173, was entered on December 27, 1977, and appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 20, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. What is the proper legal basis for the jurisdiction of a Federal District Court to review awards of Special Boards of Adjustment created pursuant to Section 3, Second of the Railway Labor Act (45 U.S.C., Section 153, Second)?

2. What are the proper legal standards to be applied by a District Court on such review?

3. Did the District Court and the Court of Appeals apply the proper legal standards for review of Award No. 408 of Special Board of Adjustment No. 605?

STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Railway Labor Act:

Title 45, Section 3, First (q) which reads as follows:

> "(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk "of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in section 1291 and 1254 of Title 28."

Title 45, Section 3, Second, first paragraph which reads as follows:

> "Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a sys-

tem, group, or regional board of adjustment is dissatisfied with such arangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

STATEMENT OF THE CASE

This case grows out of a dispute between the Brotherhood of Railway and Airline Clerks (BRAC) and the Kansas City Terminal Railway Company (Terminal Company) concerning the interpretation and application of a collective bargaining agreement between the parties known as the Stabilization Agreement guaranteeing certain employees jobs or compensation and an award of a Special Board of Adjustment in such dispute.[1]

BRAC is the authorized representative for the purposes of the Railway Labor Act (45 U.S.C., Section 151 et seq.) of the employees of the Terminal Company in the craft or class of clerical and related employees, including towermen and telegrapher employees. The individually named petitioners are employees of the Terminal Company in that carrier's Mail and Baggage Department, whose jobs were abolished by the Terminal Company effective June 23, 1975, and July 1, 1975. More than 200 employees of the Terminal Company were aggrieved by this action. The Terminal Company is a "carrier" within the meaning of the Railway Labor Act and governed by the provisions of that statute. It operates equipment and facilities and performs services in connection with transportation by railroad.

On February 7, 1965, BRAC and the railroads of the United States represented by the National Railway

[1] The relevant facts appear at pages 44-106 and 108-126 of the printed joint appendix in the Court of Appeals.

Labor Conference executed a collective bargaining agreement known as the Stabilization Agreement. The Terminal Company is one of the participating carriers and a party thereto. The Stabilization Agreement provides for a category of "protected employees". These are defined as those employees of the Terminal Company, other than seasonal employees, who either were in active service as of October 1, 1965, or who were restored to active service after October 1, 1964 and prior to February 7, 1965, and who also had two years or more of employment relationship as of October 1, 1964, and fifteen or more days of compensated service during 1964. The Agreement requires that "protected employees" be retained in service subject to compensation as provided in the Agreement. The individually named appellants are "protected" employees under these provisions.

Lay-offs may be made by the Terminal Company to the extent permitted by Article I, Section 3 of the Stabilization Agreement in accordance with the criteria and procedures set forth in such section, in the event of a decline in the carrier's business in excess of stated amounts. BRAC and the Terminal Company entered into a Memorandum Agreement, dated July 2, 1970, which provided substitute criteria to be used to measure a decline in the volume of the carrier's business equivalent to but different from criteria provided in Article I, Section 3 of the Stabilization Agreement. Article I, Section 4 of the Stabilization Agreement gives the Terminal Company the right to make force reductions under emergency conditions as there listed, subject to enumerated conditions. If a "protected employee" is furloughed other than in accordance with these provisions, he is entitled to return to service or

compensation until retired, discharged for cause, or otherwise removed by natural attrition.

The Terminal Company in return is given greater rights in the use and assignment of employees represented by BRAC than the carrier possessed under existing agreements. Under Article III, the Terminal Company has the right to make technological, operational and organizational changes and to transfer work and/or employees, and BRAC is required to enter into such implementing agreements as might be necessary for the transfer and use of such employees. Under Article II a "protected employee" loses his protected status in the event of failure to accept employment offered to him by the carrier in his craft in any seniority district or on any seniority roster on the carrier's system as provided by such implementing agreements. This provision enables the Terminal Company to make use of a "protected employee" whose job is no longer necessary.[2]

At the time the Stabilization Agreement became effective, there were twelve departments in existence at the Terminal Company, of which the Mail and Baggage Department was one, with employees who were entitled to the benefits of that Agreement. Effective June 23, 1975 the jobs of approximately 35 employees of the Mail and Baggage Department of the Terminal Company, who were "protected employees" under the Stabilization Agreement, were abolished and they were reduced to furlough status. Effective July 1, 1975, the jobs of 185 additional "protected" employees of the Mail and Baggage Department were abolished and they were reduced to furlough status. Other departments of the carrier operation continued in operation. On

[2] Appendix A to Complaint contains the Stabilization Agreement.

July 2, 1975, BRAC notified the Terminal Company that its action in furloughing the "protected employees" of the Mail and Baggage Department was in violation of the provisions of the Stabilization Agreement and urged the company to rescind its action and order the prompt restoration of such employees to service. BRAC never received a reply to this communication.

Thereafter, BRAC processed claims for the affected employees on the property of the Terminal Company, as required by the provisions of Section 3, First(i) of the Railway Labor Act (45 U.S.C., Section 153, First (i)), up to and including the highest officer of the carrier designated to handle such claims. The grievance claims were denied on the ground that the benefits of the Stabilization Agreement became inapplicable to the employees involved when the Mail and Baggage Department was completely shut down as a result of the termination of a United States Post Office contract.

Article VII of the Stabilization Agreement provides that any dispute between employee and carrier parties thereto may be referred by either party for decision to a Disputes Committee established thereunder. The parties established a Disputes Committee in accordance with these provisions, identified as Special Board of Adjustment No. 605, to hear and determine disputes submitted to it involving the interpretation and application of the Agreement. After the carrier's final rejection of the employee claims BRAC submitted the dispute to Special Board of Adjustment No. 605.

The Terminal Company contended before such Board that "protected employees" lost their protection if the particular department in which they were employed shut down. BRAC contended that such protection ap-

plied to the carrier as a whole and that "protected" employees lost their status only if the entire carrier operation closed. Since the Terminal Company continued to operate the employees involved did not lose their status and did not lose the protection of the Stabilization Agreement simply because a single department in which their jobs were located was shut down. Under the BRAC position, the Terminal Company would be required to utilize the services of the employees involved by transferring them to other departments or operations or to compensate them until retired, discharged for cause, or otherwise removed by natural attrition, or until the Terminal Company completely ceased operations. Under the Terminal Company position, they are entitled to nothing.

On March 17, 1977, Board No. 605 handed down its decision as Award No. 408, a copy of which is attached as Appendix A hereto. In that Award, signed by Neutral Member Robert M. O'Brien, the following conclusions were made:

1. The Stabilization Agreement of February 7, 1965, was applicable to the Baggage and Mail Department of the Terminal Company.
2. The termination of the mail contract which had been in existence between the United States Postal Service and the Terminal Company had the effect of terminating the provisions of the February 7, 1965, Stabilization Agreement as applied to Baggage and Mail Department employees of the Terminal Company because it brought a complete shutdown of the mail facility.
3. The employees of the Terminal Company employed in the Baggage and Mail Department who were qualified as "protected employees" under the Stabilization Agreement whose jobs

were abolished and who were furloughed when the Mail Department ceased operation are not entitled to the benefits flowing from that Agreement.

BRAC and the individual petitioners then filed a complaint in the United States District Court for the Western District of Missouri, Western Division, asking that Court to declare invalid and set aside Award No. 408 on the grounds that Special Board of Adjustment No. 605 had failed, in rendering the Award, to comply with the requirements of the Railway Labor Act and had failed to conform, or confine itself, to matters within the scope of the board's jurisdiction. The Terminal Company filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted and on the further ground that the District Court lacked subject-matter jurisdiction of the controversy. BRAC et al opposed this motion and filed a counter-motion under Rule 56 of the Federal Rules of Civil Procedure for summary judgment.

The District Court found that, although there is a continuing controversy as to guidelines for review of such an award, it had jurisdiction to review the award under the standards for review set forth in Sections 3, First (p) and (q) of the Railway Labor Act (45 U.S.C., Section 153, First (p) and (q)). It further found that such award did not violate the requirements thereof. The District Court therefore granted the Terminal Company's motion to dismiss and denied the cross-motion of BRAC et al for summary judgment.

The Court of Appeals affirmed the District Court's decision.

REASONS FOR GRANTING THE WRIT

1. There Is A Split Among Courts Of Appeal As To The Basis For Judicial Review Of Awards Of Special Boards of Adjustment Created Pursuant To Section 3, Second Of The Railway Labor Act And The Standards Applicable Thereto.

This case raises basic issues which should be decided by this Court with respect to what are the parameters of judicial review of awards of Special Boards of Adjustment created by parties pursuant to the provisions of the first paragraph of Section 3, Second of the Railway Labor Act, which permits labor organizations and railroads to establish such boards by agreement and what findings are required to set aside such awards. (45 U.S.C., Section 153, Second).

Sections 3, First (p) and (q) of the Railway Labor Act (45 U.S.C., Sections 153, First (p) and (q)) provide for limited judicial review of awards of the National Railroad Adjustment Board made under Section 3, First of the statute in suits to either enforce or set aside such awards and confer jurisdiction on appropriate Federal District Courts to set aside those awards in whole or in part on the following grounds: (quoting from Section 3, First (q) of the Act).[3]

> "The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole

[3] Section 3, First (p) of the statute provides for enforcement of awards of the National Railway Adjustment Boards while Section 3, First (q) provides for judicial review of awards by petition of aggrieved employees and carriers. The grounds for setting aside awards are identical in each section.

> or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28."

This Court in its recent decision in *Union Pacific Railroad Co.* v. *Sheehan,* 99 S. Ct. 399, decided December 4, 1978, stated that "Only upon one or more of these bases may a court set aside an order of the Adjustment Board."

However, there are no such statutory provisions relating to Special Boards of Adjustment created pursuant to Section 3, Second of the Railway Labor Act. The first paragraph of that subsection authorizes a carrier or carriers and a labor organization representing a class or classes of carrier employees to create a special board to adjust disputes of the character specified in Section 3, i.e., disputes between an employee or group of employees and a carrier growing out of grievances or out of the interpretation or application of agreements concerning, rates of pay, rules, or working conditions. Since the resclution of such dispute by an adjustment board is compulsory, *Andrews* v. *Louisville & Nashville R. Co.,* 406 U.S. 320 (1972), Section 3, Second simply authorizes an alternative to the use of a National Railroad Adjustment Board division for such compulsory arbitration. Section 3, Second does not provide, however, for the judicial review of special board awards as is provided by the 1966 amendments to Section 3, First. The second paragraph of Section 3, Second of the statute provides that awards of boards under that paragraph, i.e., so-called Public Law Boards

awards, may be enforced in the same manner and subject to the same provisions for enforcement of compliance with awards of the Adjustment Board under Section 3, First (p), but does not provide as does Section 3, First (q) for judicial review of awards by aggrie ed employees or carriers.

Award No. 408 here involved was not issued by either a division of the National Railroad Adjustment Board or by a Public Law Board created under the second paragraph of Section 3, Second of the statute. It was issued by a Special Board of Adjustment created by BRAC and all of the nation's railroads, including the Terminal Company, which are parties to the Stabilization Agreement to hear and determine disputes arising thereunder. As the District Court found, there is continuing controversy in the courts with respect to judicial review of such awards.

Originally, the Seventh Circuit held that Federal courts had no jurisdiction to review awards of Special Board of Adjustment No. 605 created by the Stabilization Agreement. *Brotherhood of Railway and Airline Clerks* v. *Special Board of Adjustment No. 605* (410 F.2d 520 (7th Cir. 1969). Subsequently in 1977, the Seventh Circuit reversed its holding and held that there was jurisdiction to review awards of Special Boards of Adjustment under Title 28, Sections 1331 and 1337 of the United States Code. *Merchants Despatch* v. *Carmen,* 511 F.2d 1045 (7th Cir. 1977). This decision followed a 1975 decision of the Fourth Circuit, *Employees Protective Association* v. *Norfolk & Western Railway Co.,* 511 F.2d 1040 (4th Cir. 1975), which based jurisdiction to review such awards on Sections 1331 and 1337 and rejected review based on Section 3, First (q) of the Railway Labor Act. On the

other hand the Fifth Circuit has consistently based jurisdiction to review awards of Special Boards on Section 3, First (q). *Brotherhood of Railroad Trainmen* v. *Central of Georgia Railway Co.,* 415 F.2d 403 (1969), *cert. den.* 396 U.S. 1008; *Diamond* v. *Terminal Railway Alabama State Docks,* 421 F.2d 228 (1970) as has also the District Court in which the suit to review the award here involved was brought. *Kansas City Southern Railway Co.* v. *Brotherhood of Railroad Trainmen,* 305 F.Supp. 1142, 1147-49 (1969).

The consequence has been confusion in the standards by which the validity of awards of Special Boards of Adjustment should be measured. Moreover, this Court has not spelled out the precise meaning of the statutory standards set forth in Section 3, First (q) of the Railway Labor Act so that there can be no uniformity in the application of such standards. The Fifth Circuit has attempted to do so in the *Central of Georgia* and *Alabama State Docks* cases cited above as discussed *infra,* pages 15, 16.

2. This Continuing Controversy Has Produced In The Present Case An Unfair Result Substantially Impairing The Protection Of The Stabilization Agreement.

The basic issue presented to Special Board of Adjustment No. 605, which rendered Award No. 408, was whether the benefits of the Stabilization Agreement between BRAC and the Terminal Company became inapplicable to "protected employees" of a particular department of the railroad when the operations of that department ceased, but the operations of the railroad as a whole continued. Award No. 408 says "yes". The board does not measure that result against either the language of the agreement or custom and practice thereunder.

The board does say that the agreement is silent on what happens if the entire railroad shuts down. But it fails to examine the language of the agreement, which deals with the carrier and the decline of its business as a whole and not with departments thereof on a compartmentalized basis, with respect to the very different problem of a shut-down of a single department. Nor does the award make any effort to inquire into the custom and practice of the parties under the agreement which showed that over a ten-year period from 1965 to 1975 the agreement had been consistently applied to employees of railroads and terminal companies whose mail handling operations had been shut down, like those of the Terminal Company, by loss of Post Office contracts.

Indeed, the board award rests on the finding that the employees involved were unable to exercise their seniority in any other facilities of the Terminal Company, a conclusion for which no authority of any kind (either in the agreement or in custom or practice thereunder) is cited. The only part of the agreement dealing with the transfer of employees from one department to another (Article III) permits the railroad to transfer "protected employees" to any job within the craft for which the employee is qualified and requires the employee to accept such transfer which is just the opposite of the board's finding.

BRAC et al therefore brought suit to set aside the awards. The complaint invoked the jurisdiction of the District Court under both Sections 3, First (p) and (q) of the Railway Labor Act and Title 28, Sections 1331 and 1337 of the United States Code because petitioners were uncertain of the basis of jurisdiction in light of the split among the circuits with respect thereto. The

complaint also alleged that Special Board of Adjustment No. 605 had not complied with the requirements of the Railway Labor Act in issuing Award No. 408 and that the award did not conform with, or confine itself, to matters within the scope of the board's jurisdiction. In its motion to dismiss the complaint, the Terminal Company argued that Sections 1331 and 1337 could not serve as a basis for jurisdiction and that suit could be brought, if at all, only under Sections 3, First (p) and (q) of the Railway Labor Act.

This position squarely raised what is to be inquired into by a District Court under Section 3, First (q) to make judgment on the allegations of the complaint. The parameters of such an inquiry were spelled out by the Fifth Circuit in the *Central of Georgia* case, *supra,* page 13, and was relied upon by BRAC et al in this case. In that case the Court (pages 411-414) discussed the scope of judicial review and found that an "award without foundation in reason or fact" is equated with an award that exceeds the authority or jurisdiction of the arbitrating body. The Court concluded as follows:

> "We conclude therefore, that the district court properly inquired into whether the awards are, in the language of the Senate Committee Report, "actually and undisputedly without foundation in reason or fact". This standard is similar to the Gunther standard: the question is whether 'the Board's interpretation was wholly baseless and without reason.' 382 U.S. at 261. As the district court fairly stated:
>
> " 'Whether we regard the Board as primarily an administrative tribunal, or as primarily a board of arbitration (it partakes of the nature of both), it must act responsibly, and if it, as an administrative tribunal, is construing and interpreting an agreement its interpretation must find some basis

in the language of the written agreement, or in the conduct of parties under that language, or in some uniform custom and practice concurred in by the parties.' "

Assuming *arguendo* that the conclusions of the Fifth Circuit constitute an accurate interpretation of the scope of judicial review under Section 3, First (p) or (q) (except for a claim of fraud), and neither the Terminal Company, the District Court, or the Court of Appeals expressed a different interpretation, there should have been an inquiry into whether Award No. 408 in such manner drew its essence from the collective bargaining agreement. See: *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Further, since it was the position of the Terminal Company that the Stabilization Agreement was silent with respect to its application to the situation involved, there should have been a specific inquiry into custom and practice under the agreement. No such inquiry was made by either Special Board of Adjustment No. 605, the District Court, or the Court of Appeals.

Indeed, the Court of Appeals finds (page 11) that "the key to the Board's decision" is the finding by the Board that because "Mail and Baggage Department employees could not exercise seniority to take positions elsewhere in other departments, those employees could not be transferred to new work," so that the employer could have an effective claim to their services after their jobs were abolished. There is only one provision of the agreement dealing with "use and assignment" of employees by the employer. That is Article III. Its provisions are:

1. Section 1 provides that an employee loses his protective status for failure to retain or obtain a

position available to him in the exercise of his seniority rights.

2. Section 2 provides that an employee loses his protective status for failure to accept employment in his craft offered to him by the carrier in any seniority district or on any seniority roster throughout the carrier's system as provided in implementing agreements required under Section 3.

3. Section 3 provides that a carrier may make technological operational and organizational changes and shall have the right to transfer work and/or transfer employees throughout the system which do not require the crossing of craft lines.

Nowhere is there any provision in the agreement that "protected employees" could not be transferred to new work if their department shuts down" and neither the Special Board, the Terminal Company, the District Court decision, nor the Court of Appeals decision can cite any such provision. Likewise, there is no such practice under the agreement nor has anyone cited such a practice in support of such alleged fact. Inquiry into the agreement and custom and practice thereunder by the District Court instead of dismissing the complaint would have revealed this gross misstatement of fact which the Court of Appeals decision states is the "key" to Award No. 408.

The Court of Appeals in footnote 6 to its decision states that it does not think the portions of the Agreement cited by BRAC "permit us to set aside the Board's finding on this point." This conclusion misses the issue entirely. BRAC did not ask the Court of Appeals to set aside the Board's finding on the basis of Article III. Its position was that the key finding by the Board was not and did not purport to be based on lan-

guage of the agreement (the award cited none and the only transfer provision did not rationally support the "key" finding) nor upon any custom and practice under the agreement and thus the Board exceeded its jurisdiction. Article III was cited only to demonstrate that there was a very real issue which should have been inquired into by both the Board and District Court but was not so examined.

CONCLUSION

The District Court decision recognizes that there is a continuing controversy over the guidelines for review of awards made under Section 3 of the Railway Labor Act. This uncertainty manifests itself both in confusion as to the guidelines for review under Sections 3, First (p) and (q) and in disagreement as to the basis for review of Special Boards created under Section 3, Second. Such confusion is apparent in the present case. It should be resolved by this Court so that the precise standards of review for all adjustment board awards are clear. This is particularly so since such awards are the product of compulsory arbitration of employee grievances and disputes involving the interpretation and application of collective bargaining agreements. Confidence in and acceptance of the results of such a compulsory process demands that confusion as to the standards applicable to the making of awards and the review thereof be clear as possible so as to eliminate so far as possible the predilections of individual arbitrators. The petition should be granted.

Respectfully submitted,

Of Counsel:

WILLIAM J. DONLON
General Counsel
Brotherhood of Railway,
Airline and Steamship
Clerks
3 Research Place
Rockville, Md. 20850

JAMES L. HIGHSAW, JR.
JOHN O'BRIEN CLARKE, JR.
HIGHSAW, MAHONEY &
FRIEDMAN, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Petitioners Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, et al.

Date: February, 1979

APPENDIX

APPENDIX A

AWARD No. 408

Case No. CL-110-W

SPECIAL BOARD OF ADJUSTMENT NO. 605

Parties to Dispute

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

and

Kansas City Terminal Railway Company

Question at Issue

(1) Does the February 7, 1965 Agreement apply to the employes of the Baggage and Mail Department of the Kansas City Terminal Railway Company?

(2) Does the loss of a mail contract, between the U.S. Postal Service and the Kansas City Terminal Railway Company, nullify the provisions of the February 7, 1965 Agreement?

(3) Are the employes of the Kansas City Terminal Company who were employed in the Baggage & Mail Department and who qualified as protected employes under the provisions of the February 7, 1965 Agreement, entitled to continue receiving the benefits flowing from that Agreement until such times as they are deprived of those benefits under the express terms of such Agreement?

Opinion of Board

The Kansas City Terminal Railway Company is admittedly a party to the February 7, 1965 Stabilization Agreement. Inasmuch as the Terminal did not have any net revenue ton miles or gross operating revenue, however, the

parties hereto had negotiated a substitute formula as required by Article I, Section 3 of the February 7, 1965 Agreement and the November 24, 1965 Interpretations. Due to the United States Postal Service terminating the mail handling contract with the Terminal, the Terminal closed their Mail and Baggage Department on July 1, 1975. Accordingly, all positions in the Mail and Baggage Department were abolished effective June 30, 1975. As a result, approximately two hundred employees in the Terminal's Mail and Baggage Department were furloughed effective June 30, 1975.

It is the Organization's position that the Terminal is still actively engaged in business notwithstanding that cancellation of the United States Postal Service contract with the Terminal relative to the handling of mail indeed resulted in a major loss of business for the Terminal. They submit that when the parties negotiated the substitute formula agreement, said agreement applied to the Terminal Company in its entirety, not merely to separate Departments thereof. Thus, the Organization contends that the February 7, 1965 Agreement applied to the Mail and Baggage Department as an integral part of the Terminal Company, not as a separate and distinct facility as now contended by the Company. Accordingly, it is their opinion that inasmuch as the Terminal Company is still engaged in business, the February 7, 1965 Agreement remains in full force and effect; and that the employees entitled to protection thereunder should have been retained in service until retired, discharged for cause, or otherwise removed by natural attrition as required by the February 7, 1965 Agreement. Thus, when the employees heretofore working in the Mail and Baggage Department were furloughed on June 23 and on June 30, 1975, the Terminal Company thereby violated the provisions of the February 7, 1965 Agreement since said employees were protected employees as provided by that Agreement and are thereby entitled to be

returned to service and compensated as provided by that Agreement.

The Terminal Company retorts, however, that the Mail and Baggage Department was one of several facilities owned and operated by them, but was a separate and distinct facility from the others. There was one separate seniority roster for the Mail and Baggage Department employees, although all employees had a common seniority date. None of the employees in the Mail and Baggage Department, however, had displacement rights to any other Department in the Terminal Company. The Terminal Company maintains that the February 7, 1965 Agreement provides protection to employees in the event of a decline in business. However, when an entire facility is terminated, such as occurred in the instant case when the Company completely terminated their Mail and Baggage facility, they assert that the February 7, 1965 Agreement is thereby inapplicable. Inasmuch as the Claimants could not exercise their seniority to other Departments within the Terminal Company, the Terminal Company thereby had no effective claim to their service, and as a result, the protective benefits provided by the February 7, 1965 Agreement were thereby inapplicable to those employees furloughed as a result of the loss in mail handling business.

A thorough review of the record at hand compels this Board to conclude that the February 7, 1965 Stabilization Agreement was intended to provide protection to employees in the event of a decline in the Carrier's business. Said Agreement was not intended, in our opinion, to accord protection to employees when the work previously performed by them disappears entirely. The February 7, 1965 Agreement simply did not address the question of what was to happen when there was a complete cessation of the Company's business. And merely because the Terminal Company was still engaged in activities separate and apart from mail handling, this nonetheless does not alter the

fact that the mail handling work previously performed by the Claimants was completely abolished when the United States Postal Service vitiated their contract with the Terminal Company.

Although the facts in Award No. 352 of this Board are distinguishable from those now before us, this Board nonetheless considers the reasoning enunciated in Award No. 352 applicable to the instant dispute. There, the Board held that the parties did not contemplate a complete cessation of Carrier's business when they negotiated Section 3 of Article I of the February 7, 1965 Agreement. This Board concurs in the reasoning therein and deems it applicable to the instant case. Accordingly, when the Terminal Company completely closed their Mail and Baggage Department effective July 1, 1975, we hold that the protective provisions of the February 7, 1965 National Agreement were thereby inapplicable to those employees furloughed as a result of the closing of the Company's Mail and Baggage facility. It matters not that the Terminal Company is still a corporate entity engaged in other business separate and distinct from mail handling. The Claimants who were furloughed on June 23 or June 30, 1975 held seniority in the Mail and Baggage Department, and were at this time unable to exercise their seniority to positions in any of the other facilities maintained by the Terminal Company. In the light of this, this Board must find that the Terminal Company was not required to accord them the protective benefits required by the February 7, 1965 Agreement. Their work simply ceased to exist and there was no reasonable likelihood that they would ever be recalled to mail and baggage service as contemplated by Section 3 of Article I of the February 7, 1965 Agreement.

Award

Question No. 1 answered in the affirmative.

Question No. 2 disposed of as per Opinion of the Board.

Question No. 3 answered in the negative.

/s/ ROBERT M. O'BRIEN
Robert M. O'Brien
Neutral Member

Dated: Washington, D. C.
March 17, 1977

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DISTRICT

No. 77-0545-CV-W-3

January 3, 1978

Filed, December 27, 1977

BROTHERHOOD OF RAILWAY, AIRLINE, AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *et al.*,
Plaintiffs,

v.

KANSAS CITY TERMINAL RAILWAY CO.,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This is an action by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) against the Kansas City Terminal Railway Co. asking that the Court review and declare invalid an award by the Special Board of Adjustment No. 605 (Award No. 408) issued in a dispute involving the interpretation and application of a collective bargaining agreement known as the Stabilization Agreement.

The plaintiff is an unincorporated labor organization which is the duly authorized representative pursuant to the provisions of the Railway Labor Act (45 U.S.C. § 151 et seq.) of the craft or class of clerical and related employees, as well as Towermen and Telegraphers of the defendant terminal company. The defendant company is a "carrier" within the meaning of the Railway Labor Act.

On February 7, 1965 there was executed pursuant to the provisions of the Railway Labor Act a collective bargaining agreement between all of the nations railroads represented by the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees and the employees of such carriers represented by five railroad labor organizations. The agreement has been in effect since February 7, 1965.

The Stabilization Agreement provides for a category of "protected employees". Reductions in the numbers of protected employees in the work force may be made by the defendant Terminal Co. in the event of a decline in the carriers business in excess of stated amounts according to criteria and procedures set forth in Article I Section 3 of the Agreemnt as supplemented by a July 2, 1970 agreement.

In June and July of 1975 the jobs of approximately 210 employes of the Mail and Baggage Department who were protected employees under the Stabilization Agreement were abolished and they were reduced to furlough status when the defendant lost its mail contract with the U.S. Postal Service and the Mail and Baggage Department was closed. After exhausting grievance procedures within the terminal company, the plaintiff submitted the dispute to a disputes committee established under the Stabilization Agreement pursuant to 45 U.S.C. § 153. The Special Board of Adjustment 605 in considering the three issues formulated and submitted by the plaintiff determined that the February 7, 1965 agreement applied to employees of the Mail and Baggage Department. However, the Board concluded that the agreement was intended to provide protection to employees in the event of a decline in the carrier's business rather than to protect employees when the work performed by them disappeared entirely.

Although the parties in this case are not in disagreement over the applicable standard of review, there has been a continuing controversy over the guidelines for review under § 153. This Court finds that § 153 Second, second paragraph providing that compliance with awards shall be

enforced in the same manner and subject to the same provisions that apply to proceeding for enforcement of compliance with awards of Adjustment Boards, adopts the standard of review explicitly set forth in § 153 First (p) and (q). Barrett v. Manuf. Rw. Co., 326 F. Supp. 639, 643-44 (E.D. Mo. 1971) aff. 453 F.2d 1305 (8th Cir. 1973). This standard of review applies to boards created under the provision of § 153 Second whether the board is created by paragraph one or two of that section. Kansas City So. Rw. Co. v. Brotherhood of RR Trainmen, 305 F. Supp. 1142 (W.D. Mo. 1969).

Judged by these standards the findings and order of Special Board 605 is conclusive on the parties and may be set aside only for (1) failure of the board to comply with the requirements of the chapter; (2) fraud or corruption of the members of the board; or (3) failure of the order to confine itself to matters within the scope of its jurisdiction. There is no contention by BRAC that grounds for review exist under either of the first two provisions. Therefore, award 408 of Special Board 605 must be upheld unless the Board is shown to have acted outside the scope of its jurisdiction. In the arbitration context an award that exceeds the authority or jurisdiction of the arbitration body is an award without foundation in reason or fact. To merit judicial enforcement an award must have a basis that is at least rationally inferable if not obviously drawn from the letter or purpose of the collective bargaining agreement. Brotherhood of RR Trainmen v. Central of Ga. Rw. Co., 415 F.2d 403 (5th Cir. 1969) c.d. 496 U.S. 1008 (1970).

In applying this standard the federal district court for the Eastern District of Missouri in Transportation-Communication Employees Union v. St. Louis-San Francisco Rw. Co., 296 F. Supp. 507 (E.D. Mo. 1968) found that when the plaintiff requested a ruling that the arbitration board had exceeded its jurisdiction by wrongly interpreting part of an agreement it was really requesting the Court to rule that the board's interpretation was incorrect. Judge Meredith concluded that this would not be a ruling on the jurisdiction of the Board but a review on the merits and it was clear that the courts were not to substitute their opinion for that of the Boards. Similarly BRAC in this case is asking the Court to consider all facts presented to the Board and substitute the Court's interpretation of the Agreement for that of the Board. However, this Court will not substitute its opinion as to the correct interpretation of the agreement for the Board under the pretext that the Board exceeded the scope of its jurisdiction.

In light of Section 1, Article VII of the Agreement providing that any dispute involving an interpretation or application of the terms of the agreement should be referred to a committee and the decision thus arrived at is final and binding, it is clear that this dispute was correctly submitted to the Board and that the Board had jurisdiction to decide the issues involved in this cause. After reviewing the decision of the Board to ascertain if it exceeded the scope of the Board's power, this Court can only conclude that Award 408 is not wholly baseless and completely without reason. Thus, the Court is unable to find that Special Board 605 exceeded its jurisdiction. There being no other basis for reviewing the Board's decision under § 153 the Court hereby

ORDERS that the defendant's motion to dismiss is granted and that plaintiff's motion for summary judgment is denied.

/s/ RUSSELL G. CLARK
Russell G. Clark, Judge
UNITED STATES DISTRICT COURT

Dated: December 27, 1977

APPENDIX C

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, JOHN W. BANKS, WILLIAM T. BANDY, JR., HARVEY B. EDWARDS, ANTHONY J. GALATE, DENVER O. NELL, R. DUANE ROGERS, *Appellants,*

v.

KANSAS CITY TERMINAL RAILWAY COMPANY, *Appellee.*

No. 78-1082.

United States Court of Appeals, Eighth Circuit.

Submitted Sept. 13, 1978.

Decided Nov. 20, 1978.

Before ROSS and HENLEY, Circuit Judges, and MARKEY,* Chief Judge.

ROSS, Circuit Judge.

The issue raised in this case requires the court to consider whether a special board of adjustment, convened pursuant to 45 U.S.C. § 153, Second of the Railway Labor Act, has rendered a decision which fails to confine itself to matters within the scope of the Board's purisdiction.

As set out in the opinion of the district court, the plaintiff-appellant, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees [hereinafter BRAC], "is an unincorporated labor organization which is the duly authorized representative pursuant to the provisions of the Railway Labor Act * * *

* The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

of the craft or class of clerical and related employees, as well as Towermen and Telegraphers of the defendant terminal company." The defendant-appellee, Kansas City Terminal Company [hereinafter Terminal Co.], "is a 'carrier' within the meaning of the Railway Labor Act."

BRAC and Terminal Co. are parties to a collective bargaining agreement executed in 1965 known as the "Stabilization Agreement." The agreement establishes a classification of "protected employees" who "will be retained in service subject to compensation as hereinafter provided unless or until retired, discharged for cause, or otherwise removed by natural attrition."

The jobs of over two hundred employees in the Terminal Company's Mail and Baggage Department were eliminated by the company in 1975, and the employees who had held those jobs were then reduced to furlough status. This occurred because the Terminal Co. lost its contract to serve the U. S. Postal Service, and the company consequently closed its Mail and Baggage Department.

BRAC challenged the Terminal Company's decision as violative of the Stabilization Agreement, contending that the furloughed employees were "protected employees" who must be retained in compensated service.

After exhausting the Terminal Co.'s grievance procedures, BRAC requested the submission of the dispute to a special board of adjustment, as provided for under the terms of the Stabilization Agreement and the Railway Labor Act. *See* 45 U.S.C. § 153, Second. BRAC submitted three issues to Special Board of Adjustment No. 605 for its resolution:

> (1) Does the February 7, 1965 Agreement apply to the employes of the Baggage and Mail Department of the Kansas City Terminal Railway Company?
>
> (2) Does the loss of a mail contract, between the U. S. Postal Service and the Kansas City Terminal Rail-

way Company, nullify the provisions of the February 7, 1965 Agreement?

(3) Are the employes of the Kansas City Terminal Company who were employed in the Baggage & Mail Department and who qualified as protected employes under the provisions of the February 7, 1965 Agreement, entitled to continue receiving the benefits flowing from that Agreement until such time as they are deprived of those benefits under the express terms of such Agreement?

The Board's neutral member issued an opinion answering these three questions in a decision which was favorable to the Terminal Co.: the Board concluded that the Baggage and Mail Department employees were *not* entitled to the protective benefits of the Stabilization Agreement.

BRAC then brought the instant action for review by the district court, pursuant to 45 U.S.C. § 153, Second, requesting the court to declare the order of the Board invalid. However, the district court found no basis on which to set the Board order aside, and BRAC appealed to this court. We affirm.

As the district court did, we begin by setting out the standard of review which is circumscribed by statute.

The Railway Labor Act provides specifically for district court review of orders of the National Railway Adjustment Board (NRAB), a 34-member body created by the legislative act for dispute resolution. 45 U.S.C. § 153 First, (p) and (q) permit judicial review of NRAB orders to the following extent:

> The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in

> whole or in part, or remanded to the division, [1] for failure of the division to comply with the requirements of this chapter, [2] for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or [3] for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.[1]

45 U.S.C. § 153, First (q).

Although a decision of a special board of adjustment, *not* the NRAB, is under review in this case, the district court concluded, and the parties agree, that the same statutory standards are applicable.

[1] Special boards of adjustment are created under the authority of 45 U.S.C. § 153, Second,[2] and the last sentence of that section states: "*Compliance with such awards shall be enforcible* by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board." (Emphasis added). We conclude that courts may consider an application to *set aside* special board orders on the same bases

---

[1] Subsection (p) of the Act provides:

> The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

[2] That section allows the carrier and a representative of the employees to establish tribunals to resolve disputes otherwise referable to the NRAB.

as well, and have inferentially approved this holding before. *See Transportation-Communication Division v. St. Louis-San Francisco Railway Co.*, 419 F.2d 933, 935 (8th Cir.), *cert. denied*, 400 U.S. 818, 91 S.Ct. 34, 27 L.Ed2d 45 (1970). *Accord, Barrett v. Manufacturers Railway Co.*, 326 F.Supp. 639, 643-44 (E.D.Mo.1971); *Kansas City Southern Railway Co. v. Brotherhood of Railroad Trainmen*, 305 F.Supp. 1142, 1147 W.D.Mo.1969); *Transportation-Communication Employees Union v. St. Louis-San Francisco Railway Co.*, 296 F.Supp. 507, 508-09 (E.D.Mo. 1968).

The parties agree that neither failure to comply with the requirements of the chapter, nor fraud and corruption by a member of the board, is at issue. The sole basis for the requested relief is that the order given did not confine itself to matters within the scope of the Board's jurisdiction.

The parties and the district court all rely on two court of appeals cases from the Fifth Circuit, *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.* 415 F.2d 403 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008, 90 S.Ct. 564, 24 L.Ed.2d 500 (1970), and *Diamond v. Terminal Railway Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970), but emphasize different language in those opinions.

[2] We conclude that the *holdings* of those opinions require enforcement of board orders as not beyond the scope of the Board's jurisdiction unless the award is "without foundation in reason or fact," *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co., supra*, 415 F.2d at 414; making that determination requires that a court refer to the language and purpose of the collective bargaining agreement:

> [W]e are concerned with whether the Board's award made "final and binding" by the Railway Labor Act is not final and binding, but may be set aside by a court because the Board did not have au-

thority to make it. That case, *Brotherhood of Railroad Trainmen v. Central of Ga. Ry. Co.*, 5 Cir., 1969, 415 F.2d 403, is controlling here. We there stated:

> "* * * In the arbitration context, an award 'without foundation in reason or fact' is equated with an award that exceeds the authority or jurisdiction on the arbitrating body. To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot be considered in any way rational, he has exceeded his jurisdiction. * * *"

Brotherhood of Railroad Trainmen v. Central of Ga. Ry. Co., 5 Cir. 1969, 415 F.2d 403, 411-412. An Adjustment Board order is not "conclusive," we then determined, when it is "so unfounded in reason and fact, so unconnected with the wording and purpose of the collective bargaining agreement as to 'manifest an infidelity to the obligation of the arbitrator.' " *Id.* at 415, citing *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). See also *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257, 261, 86 S.Ct. 368, 371, 15 L.Ed.2d 308 (1965); *Safeway Stores v. American Bakery & Con. W. I. U., Local 111*, 5 Cir., 1968, 390 F.2d 79.

Under the circumstances of this case, therefore, the District Court was required to enforce the Adjustment Board's award unless that award is "without foundation in reason or fact." *This test of the Board's jurisdiction is not whether the reviewing court agrees with the Board's interpretation of the bargaining contract, but whether the*

remedy fashioned by the Board is rationally explainable as a logical means of furthering the aims of that contract.

Diamond v. Terminal Railway Alabama State Docks, supra, 421 F.2d at 233 (emphasis added).[3]

In a more cryptic but similar statement this court has concluded: "[O]ur function is limited solely to determining whether the arbitration decision draws its essence from the collective bargaining agreement * * *" *General Committee of Adjusment v. Burlington Northern, Inc.,* 563 F.2d 1279, 1282 n.1 (8th Cir. 1977).

The decision by Special Board No. 605 made the following holdings in connection with its award favoring the Terminal Co.: (1) the Stabilization Agreement protected employees in the event of a decline in business, but did not address the problem of a complete cessation of a part of the company's business; (2) the Mail and Baggage Department employees were on a separate seniority roster and could not exercise their seniority to work in other departments of the company; (this fact was apparently gleaned from an affidavit submitted by the Terminal Co.; the decision fails to cite the source of this conclusion); (3) the work in the Mail and Baggage Department had ceased to exist, with no reasonable likelihood the employees would be recalled to service in that department.

The Board writes:

> A thorough review of the record at hand compels this Board to conclude that the February 7, 1965 Stabilization Agreement was intended to provide protection to employees in the event of a decline in the Carrier's business. Said Agreement was not intended, in our opinion, to accord protection to employees when the work previously performed by them disappears entirely. The February 7, 1965 Agreement simply did not address the question of what was to happen when there was a complete cessation of the Company's business. And merely because the Terminal Company was still engaged in activities separate and apart from mail handling, this nonetheless does not alter the fact that the mail handling work previously performed by the Claimants was completely abolished when the United States Postal Service vitiated their contract with the Terminal Company. * * * The Claimants who were furloughed on June 23 or June 30, 1975 held seniority in the Mail and Baggage Department, and were at this time unable to exercise their seniority to positions in any of the other facilities maintained by the Terminal Company was not required to accord them the protective benefits required by the February 7, 1965 Agreement. Their work simply ceased to exist and there was no reasonable likelihood that they would ever be recalled to mail and baggage service as contemplated by Section 3 of Article I of the February 7, 1965 Agreement.

[3] The appellant BRAC relies on language from the Fifth Circuit's *Central of Georgia* case, *supra,* 415 F.2d 403, which approved the district court's statement that an arbiter's construction and interpretation of a contract "must find some basis in the language of the written agreement, or in the conduct of parties under that language, or in some uniform custom and practice concurred in by the parties." *Id.* at 414. It is apparent that the appeals court considered this a restatement of its "without foundation in reason or fact" standard. *Id.*

BRAC argued to this court that the district court opinion makes no findings with respect to whether the award has any basis in the language of the Stabilization Agreemnt, in the conduct of the parties under the Agreement, or in any uniform custom and practice concurred in by the parties, and that an examination of these factors does not sustain the district court's decision to approve the award.

Specifically, with respect to the document; BRAC contends that it establishes a protective agreement between

th union and the entire carrier operation, not just a department thereof; that work force reductions under Article I, Section 3 [4] are permitted on a carrier's decline in business as a whole, and do not concern a decline in a particular department; that Article II, Section 2 requires a "protected employee" to accept employment in his craft offered to him by the carrier in any seniority district or on any seniority roster throughout the railroad system; and that Article III, Section 1 allows the carriers "to make technological, operational and organizational changes" and thereby to "transfer work and/or transfer employees" throughout the carrier's system within the craft or class in which the employee works. The gist of BRAC's argument with respect to the latter two points is that both tend to show that the Agreement was written to affect the carrier's operations as a whole, not a particular department, and that protected employees could be retained in service by being transferred.

---

[4] Article I, Section 3, provides in pertinent part:

> In the event of a decline in a carrier's business in excess of 5% in the average percentage of both gross operating revenue ton miles in any 30-day period compared with the average of the same period for the years 1963 and 1964, a reduction in forces in the crafts represented by each of the organizations signatory hereto may be made at any time during the said 30-day period below the number of employees entitled to preservation of employment under this Agreement to the extent of one percent for each one percent the said decline exceeds 5%.

Pursuant to a "Memorandum of Agreement" between BRAC and Terminal Co. substitute criteria were developed to measure a decline in business replacing "Revenue Ton Miles" and "Gross Operating Revenue" because it was agreed that those criteria were inapplicable to this particular railway company.

BRAC also argues that the award has no basis in the conduct of the parties under the Agreement,[5] or in any uniform custom and practice concurred in by the parties.

[3, 4] This court must review the decision as rendered for its rationality; it is not to embark on its own reading of the Agreement or, to substitute an improved interpretation of the contract. We do not think it can be said that the decision of the Board is not rationally inferable from the language and purpose of the contract. We understand the Board's reasoning to be as follows.

The Mediation Agreement set out the rights of protected employees and the circumstances under which they would be protected. One such circumstance was an overall *decline* in the carrier's business. In that situation protected employees were provided job security to a certain extent, and, beyond that point, the employer was allowed to make reductions in his work force. Restoration of the carrier's business then required furloughed employees to be recalled.

However, the problem of a complete *cessation* of a portion of the carrier's business had not been addressed, and, according to the Board, "[s]aid Agreement was not intended, in our opinion, to accord protection to employees,

---

[5] Here BRAC argues that no other carriers had attempted to argue that the loss of mail handling had the effect of not protecting mail department employees; that a decline in "lineal feet of mail handled" was *one* of the factors for measuring *decline* of business and reduction of forces; that a 1968 agreement between the parties excluded employees in the mail department hired after October 1962 from inclusion under the Stabilization Agreement, thus implying that earlier-hired employees were entitled to protective benefits. BRAC in this regard points to a paragraph in a 1969 agreement which allows the Terminal Co. to furlough 115 junior employees *without* job protection if the nonrail mail contract with the Post Office is cancelled. The 1969 Agreement also provided that it would "not establish a precedent or prejudice the position of either party under the present Job Stabilization Agreement • • •.

when the work previously performed by them disappears completely." Unlike a decline in business, "there was no reasonable likelihood that [employees] would ever be recalled to mail and baggage service as contemplated by [those sections of the Agreement which protected employees in the event of a decline]."

Moreover, due to the fact as found by the Board that Mail and Baggage Department employees could not exercise seniority to take positions elsewhere in other departments, those employees could not be transferred to new work. This is the key to the Board's decision, for implicit in it is the view that protective benefits for employees under the Agreement required that the employer have an effective claim to employee services either now (via transfer) or in the future (via recall). In our opinion the Board felt it would be an anomalous reading of the Agreement to *allow* an employer to reduce work forces when business declined, but require him to retain employees he could not foreseeably use at all.

We have carefully examined the Agreement's language relied upon by BRAC, as well as the custom and conduct cited in support of its interpretation, and we are not persuaded that any of BRAC's arguments rob the Board's decision of its rationality.[6]

Accordingly, the judgment of the district court is affirmed.

---

[6] According to BRAC, the Board's conclusion that the Mail and Baggage Department employees could be transferred is incorrect. We do not think the portions of the Agreement cited by BRAC permit us to set aside the Board's finding on this point.

Supreme Court, U. S.
FILED
MAR 20 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1283

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, JOHN W. BANKS, WILLIAM T. BANDY, JR., HARVEY B. EDWARDS, ANTHONY J. GALATE, DENVER O. NELL, R. DUANE ROGERS,

Petitioners,

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DANIEL M. DIBBLE
STUART W. CONRAD
LATHROP, KOONTZ, RIGHTER, CLAGETT, PARKER & NORQUIST
2600 Mutual Benefit Life Building
2345 Grand Avenue
Kansas City, Missouri 64108
(816) 842-0820

Attorneys for Respondent, The Kansas City Terminal Railway Company

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Opinions Below 1
Jurisdiction 2
Question Presented 2
Statutory Provisions Involved 2
Counterstatement of the Case 2
Argument 4
Reasons Why the Writ Should Be Denied 6
1. There Is No "Split of Authority" Among Courts of Appeal As Claimed by Petitioner 6
A. The Claimed "Split" Does Not Exist 6
B. Neither the Decisions Below nor the Record Raise the Questions Presented in the Petition As the Parties Were Agreed on Jurisdiction and the Standard of Review 8
2. The Decisions Below Are Clearly Correct 11
A. BRAC's Argument Summarized 11
B. Neither Court Below Erred in Refusing to Grant BRAC De Novo Review of the Award 15
C. BRAC Made the Same Arguments to the Board of Adjustment As It Made to the Courts Below 15
Conclusion 18
Appendix A—Petitioners' Statement of Issues to the District Court 19

Citations

CASES

Andrews v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972) 11

Brotherhood of Railroad Trainmen v. *Central of Georgia Ry. Co.*, 415 F.2d 403 (5th Cir. 1969) 14

Brotherhood of Railway, Airline and Steamship Clerks v. *Kansas City Terminal Ry. Co.*, 587 F.2d 903 (8th Cir. 1978) 7

Brotherhood of Railway, Airline and Steamship Clerks v. *Special Board of Adjustment No. 605*, 410 F.2d 520 (7th Cir. 1969) 6

Employees Protective Ass'n v. *Norfolk and W. Ry. Co.*, 511 F.2d 1040 (4th Cir. 1975) 7

Gunther v. *San Diego & A. E. R. Co.*, 382 U.S. 257 (1965) 7, 11, 16

International Association of Machinists v. *Central Airlines, Inc.*, 372 U.S. 682 (1962) 7

Locomotive Engineers v. *Louisville & Nashville R. Co.*, 373 U.S. 33 (1963) 11

Merchants Despatch Transp. Corp. v. *Systems Fed., etc., Carmen*, 551 F.2d 144 (7th Cir. 1977) 6, 7

Slocum v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950) 11

Thomas v. *Illinois Central R. Co.*, 521 F.2d 208 (5th Cir. 1975) 7

Transportation-Communication Employees Union v. *St. Louis-San Francisco Railway Company*, 296 F. Supp. 507 (E.D. Mo. 1968), *app. dism'd*, 419 F.2d 933 (8th Cir. 1969), *cert. denied*, 400 U.S. 818 (1970) 16

Union Pacific Railroad Co. v. *Price*, 360 U.S. 601 (1959) 11

Union Pacific Railroad Co. v. *Sheehan*, 99 S.Ct. 399 (1978) 11, 16

United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) 11, 15

STATUTES

Railway Labor Act, 45 U.S.C. Sections 151 *et seq.* 2, 3

Section 3, First (p) 11

Section 3, First (q) 7, 11

United States Code, Title 28 6

Section 1331 6

Section 1337 6

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1283

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, JOHN W. BANKS, WILLIAM T. BANDY, JR., HARVEY B. EDWARDS, ANTHONY J. GALATE, DENVER O. NELL, R. DUANE ROGERS,

Petitioners,

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion and order of the District Court (Appendix B to Petition) is reported at 442 F. Supp. 1173. The opinion of the Court of Appeals (Appendix C to Petition) is reported at 587 F.2d 903.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Respondent Kansas City Terminal Railway Company disagrees with the statement of Questions Presented made by Petitioners. Petitioners' first two questions are *not* presented to this Court, as we will discuss, *infra*. The *sole* question presented to this Court is:

Whether the Court of Appeals erred in affirming the District Court's decision that Special Board of Adjustment No. 605's Award No. 408 failed to conform, or confine itself, to matters within the scope of the Board's jurisdiction.

STATUTE INVOLVED

The pertinent provisions of the Railway Labor Act, 45 U.S.C., Sections 151 et seq. are set forth in the Petition at pages 2-4.

COUNTERSTATEMENT OF THE CASE

Respondent cannot adopt Petitioners' statement of the case. We believe that the statement of the case prepared by the District Court and by the Court of Appeals accurately and succinctly states the relevant facts, and we commend the following abridgement to the Court.

Petitioner Brotherhood of Railway, Airline and Steamship Clerks, etc. ("BRAC"), is an unincorporated labor

organization which is the duly authorized representative pursuant to the provisions of the Railway Labor Act (45 U.S.C. §§ 151 et seq.) of the craft or class of clerical and related employees, as well as towermen and telegraphers of the Respondent Kansas City Terminal Railway Company ("Terminal"). Terminal is a "carrier" within the meaning of the Railway Labor Act.

On February 7, 1965, pursuant to the provisions of the Railway Labor Act, a collective bargaining agreement between all of the nation's railroads represented by the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees and the employees of such carriers represented by five railroad labor organizations was executed. The agreement has been in effect since February 7, 1965 and is called the "Stabilization Agreement."

The Stabilization Agreement provides for a category of "protected employees." Reductions in the numbers of protected employees in the work force may be made by Terminal in the event of a decline in the carrier's business in excess of stated amounts according to criteria and procedures set forth in Article I, Section 3 of the Stabilization Agreement as supplemented by a July 2, 1970 agreement between Terminal and BRAC.

In June and July of 1975, the jobs of approximately 210 employees of the Mail and Baggage Department who were protected employees under the Stabilization Agreement were abolished, and they were reduced to furlough status when Terminal lost its mail contract with the U. S. Postal Service and the Mail and Baggage Department was closed. On-premises grievance procedures were exhausted, and BRAC submitted the dispute to a disputes committee established under the Stabilization Agreement pursuant

to 45 U.S.C § 153. Special Board of Adjustment 605, in considering the three issues formulated and submitted by BRAC, determined that the February 7, 1965 agreement applied to employees of the Mail and Baggage Department. However, the Board concluded that the agreement was intended to provide protection to employees in the event of a decline in the carrier's business rather than to protect employees when the work performed by them disappeared entirely and the Award so stated.

BRAC then sought to have this Award set aside. Its Complaint in the District Court was filed July 21, 1977. On September 14, 1977, Terminal moved to dismiss. Following substantial briefing, the District Court's order dismissing the Complaint was entered December 27, 1977. BRAC perfected its appeal to the Court of Appeals which affirmed the District Court.

Argument

Terminal disagrees with BRAC's statement of the case, not in its chronology, but because BRAC states the contentions of the parties and characterizes the Award to suit BRAC's own purposes in this proceeding. It must, however, be remembered that BRAC's interpretations were urged to and rejected by the Special Board. Accordingly, BRAC's statements that the employees are protected from certain occurrences (Petition, pp. 5-6); as to the circumstances of furlough (Petition, p. 5); as to Terminal's "greater rights" (Petition, p. 6); that Terminal contended that the Stabilization Agreement "became" inapplicable to certain employees upon the closing of the Mail and Baggage Department (Petition, pp. 7-8); and that Terminal contended that these employees "lost" protection upon the closing of the Mail and Baggage Department (Id.); are not statements of fact. Rather, they are BRAC's contentions about the Stabilization Agreement and the contract dispute—contentions which were made to and rejected by the Board in its Award. BRAC now seeks review of the lower decisions that the Award was not wholly baseless and without reason essentially on the grounds that the Board wrongly rejected BRAC's contentions. We submit BRAC simply seeks review of the Award on the merits.

We also disagree with BRAC's characterizations of the conclusions reached in the Award. (Petition, pp. 8-9). The Award has been reproduced in the Appendix to the Petition at page 1a and speaks for itself.

BRAC submitted the issue to the Special Board. The Board ruled against BRAC. BRAC then challenged the Award which it itself had requested. Both the District Court and the Court of Appeals rejected BRAC's claims and BRAC now seeks to present them to this Court under guise of a Petition for Certiorari. We are not here to dispute what the agreement between the parties provides or does not provide; whether it protects all or only some employees; whether it protects them from all or only certain occurrences; or whether the agreement gives protected employees no rights in certain circumstances. Such issues cannot be raised in a proceeding to review a special board award under the Railway Labor Act, and are not before this Court. This Court is petitioned to make a discretionary review of a decision that an arbitration board's award did not exceed the jurisdiction of that board.

The merits of this dispute have been decided. The only issue presented to this Court is whether the courts below erred in ruling that the merits *had* been decided and that BRAC had failed to show that the decision was beyond the jurisdiction of the Special Board which entered it.

REASONS WHY THE WRIT SHOULD BE DENIED

1. There Is No "Split of Authority" Among Courts of Appeal As Claimed by Petitioner.

A. The Claimed "Split" Does Not Exist.

No amount of semantic exercise can convert this case into one warranting review by this Court on certiorari.

Petitioners argue that there is a "split" among the Courts of Appeal as to the jurisdictional basis for review of Special Board awards and that the "split" has created confusion as to the standards by "which the validity of awards of Special Boards of Adjustment should be measured." (Petition, p. 13). The Petition, however, has failed to demonstrate the existence of any divergence between Courts of Appeal on any issue which is in this case. As pointed out in the Petition, a split may have existed between 1969 and 1977 by reason of the Seventh Circuit's holding, in *Brotherhood of Railway, Airline and Steamship Clerks* v. *Special Board of Adjustment No. 605,* 410 F.2d 520 (7th Cir. 1969), that federal courts have no jurisdiction to review awards of Special Boards of Adjustment. However, that holding was reversed in *Merchants Despatch Transp. Corp.* v. *Systems Fed., etc., Carmen,* 551 F.2d 144 (7th Cir. 1977) ending any divergence among the Courts of Appeal.

Whether courts have found a jurisdictional basis to review such awards under the express language of the Railway Labor Act or under 28 U.S.C., Sections 1331 and 1337 is a distinction without a difference because the same standard of review is applied. The Court of Appeals for the Fourth Circuit, finding jurisdiction under Title 28, ruled:

> "The judgment will be vacated and the case remanded to the district court for the limited purpose of deciding whether Board No. 813 *exceeded its jurisdiction* in making the award under attack in this case." *Employees Protective Ass'n* v. *Norfolk and W. Ry. Co.,* 511 F.2d 1040, 1046 (4th Cir. 1975) (Emphasis added).

And the Seventh Circuit, in *Merchants Despatch Transp. Corp.* v. *Systems Fed., etc., Carmen,* 551 F.2d 144, 152 (7th Cir. 1977) noted the need for uniformity of standards, citing this Court's decision in *International Association of Machinists* v. *Central Airlines, Inc.,* 372 U.S. 682 (1963) and rewarded to the district court in accord with the Fourth Circuit's decision.

Thus, *all* of the Courts of Appeal which have considered the question of the standard of review to be applied in a challenge to an award of a voluntary special board have ruled that the award must be upheld unless the board exceeded its jurisdiction. *Brotherhood of Railway, Airline and Steamship Clerks* v. *Kansas City Terminal Ry. Co.,* 587 F.2d 903 (8th Cir. 1978); *Merchants Despatch Transp. Corp.* v. *Systems Fed., etc., Carmen, supra; Employees Protective Ass'r* v. *Norfolk and W. Ry. Co., supra; see Thomas* v. *Illinois Central R. Co.,* 521 F.2d 208, 212 (5th Cir. 1975). The claimed conflict among the Courts of Appeal has no substance.

Neither is there merit in BRAC's contention that this Court has not "spelled out the precise meaning of the statutory standards" in Section 3, First (q). (Petition, p. 13). This Court, in *Gunther* v. *San Diego & A. E. R. Co.,* 382 U.S. 257 (1965) has spoken on the scope of review under the identical standard in Section 3, First (p) and the Courts of Appeal have relied on *Gunther* in reviewing special board awards. Moreover, *Gunther* dealt directly

with the "excess of jurisdiction" standard under which BRAC sought review.

B. Neither the Decisions Below nor the Record Raise the Questions Presented in the Petition As the Parties Were Agreed on Jurisdiction and the Standard of Review.

Petitioners' claim that there was confusion about the jurisdictional base or the proper standard of review is without substance.

On or about February 9, 1978 BRAC filed with the United States District Court the following statement of issues on appeal (reproduced as Appendix A hereto):

> "1. Whether the District Court failed to properly apply the standards prescribed in the Railway Labor Act [45 U.S.C., Section 3, First (q)] for review of an award of a Special Board of Adjustment?
>
> 2. Whether the District Court erred in failing to set aside Special Board of Adjustment No. 605's Award No. 408 for exceeding its authority and jurisdiction in its finding that employees of the Mail and Baggage Department of appellee, while entitled to protective benefits under stabilization agreement of February 7, 1965, could nevertheless be deprived of those benefits by appellee, who closed down the Department while continuing to operate and to have employees?"

The District Court noted in its Order Granting Defendant's Motion to Dismiss that the parties were not in disagreement over the applicable standard of review, noted the three grounds specified in Section 3, First (q) under which a Special Board order might be set aside, and noted that "[t]here is no contention by BRAC that grounds for review exist under either of the first two provisions.

Therefore, Award 408 of Special Board 605 must be upheld unless the Board is shown to have acted outside the scope of its jurisdiction." The District Court then stated that it was unable to find that Special Board 605 exceeded its jurisdiction.

In its brief in the Court of Appeals, BRAC repeated the same two issues which it was appealing. (BRAC Brief to the Court of Appeals, p. 2). There was no claim by BRAC at any time that the District Court had applied an improper standard of review or had done so under an incorrect jurisdictional base. To the contrary, BRAC stated in its brief:

> "The District Court granted the Motion to Dismiss but found that there was jurisdiction to review Award No. 408 under the standard set forth in Sections 153, First (p) and (q) of the Railway Labor Act. (45 U.S.C., Sections 153 (p) and (q)).
>
> The appellants, BRAC et al. do not contest the District Court's finding that Award No. 408 is subject to judicial review pursuant to the standards of the cited provisions of the Railway Labor Act.
>
> . . .
>
> The appeal of BRAC does not, therefore, raise an issue with respect to the decision of the District Court to apply the standards of Sections 3, First (p) and (q), Railway Labor Act, to the review of Award No. 408, but rather to the District Court's decision as to the scope of review under those statutory provisions, and the application thereof to the award." (BRAC Brief to the Court of Appeals, pp. 14, 19; footnotes omitted).

Accordingly, not only is there no issue in this case about the jurisdiction of the District Court to review the

award, there is no issue as to the standard of review to be applied.[1] BRAC claimed the District Court did not correctly apply the standard, not that it applied the wrong standard. The parties agreed as to the proper standard of review; they disagreed only as to the application of that standard to the facts. BRAC simply argues that the District Court applied the standard incorrectly because it decided the issue against BRAC.

BRAC evidenced no such claimed confusion at the District Court and, after the District Court decided against it, BRAC then framed the issues for appeal to the Court of Appeals. Now, after both the District Court and the Court of Appeals have answered the question put to them by BRAC, BRAC is dissatisfied with their answers. We submit that the alleged "split" is akin to BRAC's underlying argument that, while BRAC framed the three questions posed to the Special Board of Adjustment, and, presumably, that Special Board would have had jurisdiction to answer the questions in BRAC's favor, the Special Board had no jurisdiction to decide the question against BRAC and against its contentions. BRAC's attempted creation of a "split" among the Courts of Appeal is an obvious effort to disrupt settled law as to the finality of Railway Labor Act Adjustment Board awards and the

1. This was recognized by the Court of Appeals which stated:

"Although a decision of a special board of adjustment, *not* the NRAB, is under review in this case, the district court concluded, *and the parties agree, that the same statutory standards are applicable.*

. . .

The parties agree that neither failure to comply with the requirements of the chapter, nor fraud and corruption by a member of the board, is at issue. The sole basis for the requested relief is that the order given did not confine itself to matters within the scope of the Board's jurisdiction." 587 F.2d at 905, 906. (Emphasis added).

applicable standards of limited judicial review, and to inject the federal judiciary into railroad labor-management disputes as a "super" board of adjustment. *Union Pacific Railroad Co.* v. *Sheehan*, 99 S.Ct. 399 (1978); *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972); *Gunther* v. *San Diego & A. E. R. Co.*, 382 U.S. 257 (1965); *Locomotive Engineers* v. *Louisville & Nashville R. Co.*, 373 U.S. 33 (1963); *Union Pacific R. Co.* v. *Price*, 360 U.S. 601 (1959); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950). *See, United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

2. The Decisions Below Are Clearly Correct.

A. BRAC's Argument Summarized.

The essence of BRAC's argument to the courts below and now to this Court is found on pages 13 through 18 of its Petition. It is in these 6 pages that BRAC tries to show both that the Board made a mistake in not finding for BRAC in the first place and that the District Court and Court of Appeals erred in their application of the only standard of review BRAC requested them to use. BRAC asked the District Court to find that the Board had failed to confine itself to matters within the scope of the Board's jurisdiction, the only one of the three possible challenges permitted under Section 3, First (p) & (q) of the Railway Labor Act which BRAC raised. To place BRAC's argument in perspective, we must refer to what the Board's Award actually awarded.

The first question BRAC submitted to the Special Board was:

> "(1) Does the February 7, 1965 Agreement apply to the employees of the Baggage and Mail Department of the Kansas City Terminal Railway Company?"

The Board's answer was:

"Question No. 1 answered in the affirmative." (Petitioner's Appendix 1a, 5a).

The second question which BRAC submitted to the Special Board was:

"(2) Does the loss of a mail contract, between the U.S. Postal Service and the Kansas City Terminal Railway Company, nullify the provisions of the February 7, 1965 agreement?"

The Board's answer was:

"Question No. 2 disposed of as per Opinion of the Board." (Petitioner's Appendix pp. 1a, 5a).

The third question BRAC asked the Board was:
"(3) Are the employes of the Kansas City Terminal Company who were employed in the Baggage & Mail Department and who qualified as protected employes under the provisions of the February 7, 1965 Agreement, entitled to continue receiving the benefits flowing from that Agreement until such time as they are deprived of those benefits under the express terms of such Agreement?"

The Board answered the third question:

"Question No. 3 answered in the negative." (Petitioner's Appendix, pp. 1a, 5a).

After summarizing the positions and the contentions of BRAC and of Terminal with respect to the three questions, and principally with respect to question No. 3, the Board stated:

"A thorough review of the record at hand compels this Board to conclude that the February 7, 1965 Stabilization Agreement was intended to provide protection to employes in the event of a decline in the Carrier's business. Said Agreement was not intended, in our opinion, to accord protection to employes when the work previously performed by them disappears entirely. The February 7, 1965 Agreement simply did not address the question of what was to happen when there was a complete cessation of the Company's business. And merely because the Terminal Company was still engaged in activities separate and apart from mail handling, this nonetheless does not alter the fact that the mail handling work previously performed by the Claimants was completely abolished when the United States Postal Service vitiated their contract with the Terminal Company." (Pet. Appendix A, pp. 3a-4a).

BRAC now says, as it said to the District Court and the Court of Appeals: Because the Board found that the Agreement was silent concerning and did not give protection to the employes in circumstances disclosed by the record, there is, therefore, no basis in the language of the Agreement for the award. (Petition, p. 16). This circular reasoning constitutes the whole of BRAC's six-page argument that the Board exceeded its jurisdiction and that the Courts below erred in not so finding. If the Board had decided the third question in the affirmative, we submit that BRAC would claim that the award was within the Board's jurisdiction and that it was entitled to essentially absolute finality. According to BRAC, however, the Board lacks jurisdiction to decide the issue and to answer the question against BRAC. BRAC argues for the strange situation where it can submit the dispute for arbitration but the arbitrator can decide the dispute only one way and remain within his jurisdiction.

BRAC pressed the courts below to give effect to language in *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 415 F.2d 403 (5th Cir. 1969) as authority for its position that Special Board No. 605's interpretation of the Stabilization Agreement must find some basis in the affirmative language of the Agreement. The *Central of Georgia* Court explained the limited standard of review repetitively approved by this Court:

> "The broad leeway that courts must afford to arbitrators' decisions stems from the fact that '[i]t is the arbitrator's construction which was bargained for; *and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.' United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 1960, 363 U.S. 593, 599, 80 S.Ct. 1358, 1362, 4 L.Ed.2d 1424, 1429." *Id.* at 412. (Emphasis added).

As the Court of Appeals below pointed out, "it is apparent that the appeals court considered [BRAC's touted language] a restatement of its 'without foundation in reason or fact' standard." 587 F.2d at 907 n.3.

Certainly the language of a labor agreement is as significant in what it does *not* say as in what it says. Parties may agree *not* to agree. They may deliberately and knowingly prepare an agreement which does *not* speak to certain factual situations. In the instant case, the arbitrator found that the contract upon which BRAC relies did not provide the substantive relief or the remedy BRAC sought through the arbitration process because it was silent as to the involved circumstance. The decision by an experienced and informed Board of Arbitrators determined that the job protection provisions of an agreement negotiated by two experienced and informed parties did *not* apply, and had never applied, to a specific factual situation. How such a construction can then be claimed not to be "based in the language of the written agreement" defies reason.

B. Neither Court Below Erred in Refusing to Grant BRAC De Novo Review of the Award.

BRAC's reasoning throughout this case has been deceptively simple: BRAC claimed that the award must be in excess of the Special Board's jurisdiction because it lacks a basis in the language of the February 7, 1965 Stabilization Agreement *as BRAC construes that Agreement.* Almost every party which loses a contract construction arbitration could make the same claim. The parties voluntarily bargained for the Board's experienced and expert construction and application of the Agreement and BRAC submitted the issues for construction to the Board. It is not BRAC's views as to the construction and application of the Stabilization Agreement against which the arbitration Board's award was to be tested, but whether the award reflects and is based on the *Board's* construction and application of the Agreement. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Manifestly, Award No. 408 is based on the Board's construction of the Agreement.

C. BRAC Made the Same Arguments to the Board of Adjustment As It Made to the Courts Below.

BRAC's arguments raised beginning on page 13 and continuing through the end of the Petition are nothing more than reworded variations of the arguments which BRAC made or should have made to and which were rejected by Board No. 605—arguments which were succinctly

summarized in the Award itself. (See Appendix A to Petition, pp. 2a-3a). This alone would have formed a sufficient basis for the action of the courts below. *Union Pacific Railroad Co.* v. *Sheehan*, 99 S.Ct. 399 (1978); *Gunther* v. *San Diego & A. E. R. Co.*, 382 U.S. 257, 263-64 (1965). The Board concluded that the Stabilization Agreement did not provide the protection which BRAC contended it did. BRAC has circuitously sought a second bite from the apple by seeking a judicial ruling on the merits of the dispute, thus recasting its arguments for the courts below as reasons why the Award exceeded the Board's "jurisdiction," and here as an "unfair result" caused by a "split" in the Circuits. In a decision which was cited by the Court of Appeals, District Judge James Meredith identified and rejected this same flawed approach in *Transportation-Communication Employees Union* v. *St. Louis-San Francisco Railway Company*, 296 F. Supp. 507, 510 (E.D. Mo. 1968), *app. dism'd*, 419 F.2d 933 (8th Cir. 1969), *cert. denied*, 400 U.S. 818 (1970):

> "The essence of what Frisco is requesting of this Court is an interpretation of the provisions of the bargaining agreement between the parties. Frisco is requesting an interpretation that the Board exceeded its jurisdiction in that it wrongly interpreted the Scope Rule. The Court is, thus, requested to rule that the Board's interpretation of the Scope Rule was incorrect. This would not be a ruling on the jurisdiction of the Board, but a review of the merits of the Board's decision. Congress and the Supreme Court have made it very clear that the courts are not to substitute their opinion for that of the Board's. The courts may set aside a decision of a board only if it is 'wholly baseless and completely without reason.' The decision must be 'actually and indisputably without foundation in reason or fact.' "

Understandably, BRAC's Petition is devoid of any rationale for escaping the explicit language of the Award which refers to the Stabilization Agreement, discusses its interpretations as contended by the parties, cites a prior decision as precedent for the Board's reasoning, and concludes that the Stabilization Agreement was not intended to provide BRAC substantive entitlement to the relief it claims. To argue that the Board's decision was "wholly without basis" in the February 7, 1965 Stabilization Agreement because BRAC finds no specific provisions denying its claims, is on a par with arguing that a contract for a sale of a horse cannot be said to be inapplicable to the sale of a cow because there is no specific exclusion of cows in the contract.

The Board, after carefully considering the provisions and the purposes of the agreement, concluded it applied only to separations from service caused by a decline in a carrier's business, and not to what the Board found was a complete cessation of all the work the employees had previously performed. A reading of the Board's opinion, in and of itself, is sufficient to show the speciousness of a contention that the award is wholly baseless.

BRAC does not deny that the dispute was submitted to the Board; it does not deny that it framed the questions posed to the Board; it does not deny that it briefed the issues; it does not deny that it argued its contentions to the Board; it cannot deny that its contentions here as to the merits of the dispute are in any material respect different from those which were or should have been urged to and which were ruled on by the Board. To reargue those merits is exactly what BRAC wants.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL M. DIBBLE
STUART W. CONRAD
LATHROP, KOONTZ, RIGHTER, CLAGETT, PARKER & NORQUIST
2600 Mutual Benefit Life Building
2345 Grand Avenue
Kansas City, Missouri 64108
(816) 842-0820
Attorneys for Respondent, The Kansas City Terminal Railway Company

APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.,
Plaintiffs,

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY,
Defendant.

STATEMENT OF ISSUES

Come now appellants and submit the following statement of issues:

1. Whether the District Court failed to properly apply the standards prescribed in the Railway Labor Act [45 U.S.C., Section 3, First (q)] for review of an award of a Special Board of Adjustment?

2. Whether the District Court erred in failing to set aside Special Board of Adjustment No. 605's Award No. 408 for exceeding its authority and jurisdiction in its finding that employees of the Mail and Baggage Department of appellee, while entitled to protective benefits under stabilization agreement of February 7, 1965, could never-

theless be deprived of those benefits by appellee, who closed down the Department while continuing to operate and to have employees?

Knipmeyer, McCann, Fish & Smith

By Glenn McCann

1800 Power & Light Building
Kansas City, Missouri 64105
211-9500

Highsaw, Mahoney & Friedman

By James L. Highsaw

1050—17th Street, N.W.
Washington, D.C. 20036
296-8500

Attorneys for Plaintiffs

Of counsel:

William J. Donlon, General Counsel

Brotherhood of Railway and Airline Clerks
6300 North River Road
Rosemont, Illinois 60018

A copy of the foregoing was mailed this 9th day of February, 1978, to: William J. Donlon, 6300 North River Road, Rosemont, Illinois 60018; and to Sam D. Parker, Harlan D. Burkhead and Stuart W. Conrad, 1500 TenMain Center, Kansas City, Missouri 64105, Attorneys for Defendant.

.....

Supreme Court, U. S.
FILED
APR 11 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1283

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, JOHN W. BANKS, WILLIAM T. BANDY, JR., HARVEY B. EDWARDS, ANTHONY J. GALATE, DENVER O. NELL, R. DUANE ROGERS,
Petitioners,

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

DANIEL M. DIBBLE
STUART W. CONRAD
LATHROP, KOONTZ, RIGHTER, CLAGETT, PARKER & NORQUIST
2600 Mutual Benefit Life Building
2345 Grand Avenue
Kansas City, Missouri 64108
(816) 842-0820
Attorneys for Respondent, The Kansas City Terminal Railway Company

April, 1979

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1283

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, JOHN W. BANKS, WILLIAM T. BANDY, JR., HARVEY B. EDWARDS, ANTHONY J. GALATE, DENVER O. NELL, R. DUANE ROGERS,

Petitioners,

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

Respondent Kansas City Terminal Railway Company (Terminal) files this Supplemental Brief in Opposition pursuant to Supreme Court Rule 24(5) to advise the Court of a decision of the United States Court of Appeals for the Fifth Circuit in *Brotherhood of Railway, Airline and Steamship Clerks* v. *Jacksonville Terminal Company,*

No. 78-2682 (March 28, 1979). The Fifth Circuit opinion, which is set out in full in the appendix to this Supplemental Brief, was rendered after the filing of Respondent's original Brief in Opposition. Had the opinion been available at the time the Brief in Opposition was filed, it would have appeared with the authorities discussed in the first and second full paragraphs appearing on page 7 of that Brief.

Jacksonville Terminal deals with facts and issues similar to those presented here, *i.e.*, whether or not special Board of Adjustment No. 605 exceeded its jurisdiction in finding that the stabilization agreement involved in this case does not provide job protection for mail handlers whose work was abolished when the U. S. Postal Service took away all of the railroad's mail business. In refusing to set aside the award, the Fifth Circuit, adopting the District Court's opinion, held that (1) the award of the voluntary Board of Adjustment is to be reviewed under the standards of the Railway Labor Act applicable to review of awards by the National Railroad Adjustment Board; (2) *Gunther* v. *San Diego & A. E. R. Co.*, 382 U.S. 257 (1965) articulates the requirement of the Act that an arbitration board "confine itself to matters within the scope of its jurisdiction"; and (3) *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 415 F.2d 403 (5th Cir. 1969), upon which Petitioners rely here, offers no basis for setting aside the award.

In short, *Jacksonville Terminal* shows clearly that there is no conflict among the Courts of Appeal as to the standards of review of voluntary board awards, and no need for further elucidation by this Court of the manner in which those standards should be applied.

CONCLUSION

For the foregoing reasons, as well as those advanced in Terminal's Brief in Opposition, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

DANIEL M. DIBBLE
STUART W. CONRAD
LATHROP, KOONTZ, RIGHTER, CLAGETT, PARKER & NORQUIST
2600 Mutual Benefit Life Building
2345 Grand Avenue
Kansas City, Missouri 64108
(816) 842-0820
Attorneys for Respondent, The Kansas City Terminal Railway Company

APPENDIX

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.,
Plaintiffs-Appellants,

v.

JACKSONVILLE TERMINAL COMPANY,
Defendant-Appellee.

No. 78-2682
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

March 28, 1979.

Appeal from the United States District Court for the Middle District of Florida.

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

Appellants, an unincorporated labor organization and individual employees of appellee, brought an action in the District Court for the Middle District of Florida, Jacksonville Division, asking that an award of a Special Board of Adjustment established pursuant to the Railway Labor Act, 45 U.S.C. § 153, Second, be reviewed and declared invalid.

---

*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

The district court, George C. Carr, Judge, ruled in favor of appellee, and this appeal is from that order and judgment dismissing the case.

In a memorandum opinion accompanying the Order of Dismissal, the district judge cited the case of *BRAC* v. *Kansas City Terminal Ry.*, 442 F.Supp. 1173 (W.D.Mo. 1977). Noting that the cited case has since been affirmed by the Eighth Circuit, *BRAC* v. *Kansas City Terminal Ry.*, 587 F.2d 903 (8th Cir. 1978), we affirm on the basis of the District Court's opinion attached as an Appendix.

AFFIRMED.

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 77-521-Civ-J-C

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.,
Plaintiffs,

vs.

JACKSONVILLE TERMINAL COMPANY,
Defendant.

MEMORANDUM OPINION

CARR, District Judge.

The Court has for consideration the defendant's motions to dismiss and strike and plaintiffs' motion for summary judgment. The Court held a hearing on the motions

on March 15, 1978. Upon review of the memoranda and oral argument of the parties, the Court is of the opinion that defendant's motion to dismiss should be granted. All other pending motions, therefore, need not be discussed.

Plaintiffs are the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, (hereinafter cited as B.R.A.C.), and five named individuals who are members of B.R.A.C. The individual plaintiffs were formerly employed by the defendant, Jacksonville Terminal Company, as mail handlers in its Baggage and Mail Department. B.R.A.C. is the duly authorized representative of the individuals named herein.

On February 7, 1965, a collective bargaining agreement, identified as the Stabilization Agreement was entered into by all the nation's railroads and the five labor organizations representing the railroad employees. The purpose of the agreement, as outlined by the parties in argument, was to provide protective benefits to employees of carriers who might be harmed by predictable technological advances in the industry. In exchange for these protective benefits, the carriers acquired the right to transfer and rearrange work with employees throughout the carrier system in order to implement technological, operational, and organizational changes. The carrier was restricted by the agreement because it could not require the crossing of craft lines by employees. This agreement was executed pursuant to the provisions of the Railway Labor Act and remains in effect. The plaintiffs named in the complaint qualified under the provisions of the Stabilization Agreement as "protected employees" and as such were eligible for the protective benefits provided under the agreement.

On September 12, 1975 the individual plaintiffs were informed that their positions as mail handlers would be

abolished as of October 18, 1975. The reason for their termination by the defendant was that the contract between Jacksonville Terminal Company and the United States Postal Service relative to the handling of bulk mail had expired. The Postal Service as of the date of the plaintiffs' termination had completed a new facility in Jacksonville for the handling of bulk mail and had hired a labor force to perform those operations.

After the September 12, 1978 notice was posted, B.R.A.C. representatives corresponded frequently with the defendant and steadfastly asserted that the employees handling mail were "protected employees" and could not be fired. The defendant responded to the B.R.A.C. assertions by stating that that Stabilization Agreement did not offer protection to employees in those situations where the business of a specific facility was completely terminated. The defendant did continue to employ several workers after the plaintiffs' termination, but the retained employees worked in a switching tower and were never involved in the company's mail operation.

When the parties failed to reach an agreement as to the application of the Stabilization Agreement, the plaintiffs submitted the dispute to the disputes committee created by Article VII of the Stabilization Agreement. Upon consideration of the briefs and evidentiary documentation of the parties, dispute committee, Special Board of Adjustment 605 (Award No. 409), found that the Stabilization Agreement contemplated the decline in the carrier's business, but did not contemplate the complete cessation of the carrier's business. The Special Board of Adjustment also considered the plaintiffs' contention regarding the continued employment of the towermen by the defendant, but rejected the significance of this fact in light of the complete cessation of work at the mail facility.

The Present Litigation

On July 19, 1977, approximately four months after the ruling in Award No. 409 by Special Board of Adjustment 605, the plaintiffs filed suit in this Court seeking review of Award No. 409. The Court has jurisdiction of the complaint pursuant to both 28 U.S.C. §§ 1331 and 1337. Although there was some initial speculation whether district courts could review arbitration awards pursuant to voluntary agreements (like the Stabilization Agreement) as opposed to an arbitration award issued by a statutorily created arbitration board (National Railroad Adjustment Board), the weight of authority now supports review on the awards of both types of boards on the same basis. *Employees Protective Ass'n* v. *Norfolk and Western Railway Co.*, 511 F.2d 1040 (4th Cir. 1975); *Brotherhood of Locomotive Engineers* v. *Denver and Rio Grande Western Railroad*, 411 F.2d 1115 (10th Cir. 1969); *Kansas City Southern Railway Co.* v. *Brotherhood of Railway Trainmen*, 305 F.Supp. 1142 (W.D.Mo.1969); *contra Brotherhood of Railway Employees* v. *Special Board of Adjustment No. 605*, 410 F.2d 520 (7th Cir. 1969). Thus it is settled that voluntary arbitration awards can be reviewed and the scope of review by the Court is the same as that applied to statutory arbitration awards. The scope of review which is clearly set forth in 45 U.S.C. § 153 First (p) and (q), limits invalidation of a special board's findings only to (1) failure of the board to comply with the requirements of the Railway Labor Act; (2) failure of the order to confine itself to matters within the scope of its jurisdiction; or (3) fraud or corruption of the members of the board. The plaintiffs contend that the award of the special board is invalid because it failed to comply with the requirements of the Railway Labor Act and because it failed to confine itself to matters with the scope of its jurisdiction. *See* plaintiffs' complaint, Paragraph 17.

The Supreme Court in *Gunther* v. *San Diego and Arizona E. R. Co.*, 382 U.S. 257, 86 S.Ct. 368, 15 L.Ed.2d 308 (1965) discussed the restricted power of the Courts to review findings and orders made by the Board. In *Gunther* the Court in reversing the District Court's invalidation of the Board's decision stated, "certainly it cannot be said that the Board's interpretation was wholly baseless and completely without reason." The Fifth Circuit in elaborating upon *Gunther* has opined,

> . . . In the arbitration context, an award "without foundation in reason or fact" is equated with an award that exceeds the authority or jurisdiction on the arbitrating body. To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement.
>
> . . . If there is no rational way to explain the remedy handed down by the arbitrator as a logical means of furthering the aims of the contract, that is, if an award is "without foundation in reason or fact", the award lies beyond the arbitrator's jurisdiction.

Brotherhood of Railroad Trainmen v. *Central of Georgia Railway Co.*, 415 F.2d 403, 411-412 (5th Cir. 1969). *See also Diamond* v. *Terminal Railway Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970).

The plaintiffs contend that Special Board of Adjustment No. 605 (Award No. 409) departed from its jurisdiction because its interpretation of the dispute was without basis in the written agreement, the conduct of the parties under that language, or in some uniform custom and practice concurred in by the parties. *Brotherhood of Railroad Trainmen* v. *Central of Georgia Railway Co.*, *supra* at 414. The plaintiffs' chief disagreement with the Board's decision is that it equated the closing of the defendant's Baggage

and Mail Department with a complete cessation of the defendant's business.

Given the facts relative to the closing of the defendant's Baggage and Mail Department, the Board's decision has a foundation in reason and fact. The Board's decision simply acknowledged that for all practical purposes the termination of the work in the Baggage and Mail Department was not a decline in work of the defendant, within the terms of the Stabilization Agreement, but was the death knell of defendant's entire business operation. The Board further acknowledged that the defendant could not be expected to terminate all its operations on a single day. It is significant to note that the Board's determination relative to the termination of businesses is a decision which follows the Board's prior precedent although without the segmentation question. Special Board of Adjustment No. 605 (Awards No. 352 and 408). It is clear from a reading of the Board's decision that it followed its obligation in evaluating whether the dispute was within, not only the language of the agreement, but within its purposes. In deciding that the parties had not designed the Stabilization Agreement to handle the dispute presented, the Board did not go outside its jurisdiction but dealt squarely with the failure of the contract in question to provide a remedy. Thus upon consideration of the Board's decision and record, the Stabilization Agreement, and the memoranda of the parties, the Court is of the opinion that the Board acted within its jurisdiction, that it complied with the requirements of the Railway Labor Act, and that its decision was a logical means of furthering the aim and purpose of the contract. *BRAC* v. *Kansas City Terminal Railway Co.*, 442 F.Supp. 1173 (W.D.Mo.1977). Accordingly, the defendant's motion to dismiss should be and is hereby granted.

DONE AND ORDERED in Chambers in Jacksonville, Florida this 30th day of June, 1978.